United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7188

United States Court of Appeals

For the Second Circuit

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P/S

Docket No. 77-7188

REGAL HEALTH SPA, INC.,
Plaintiff-Appellant,

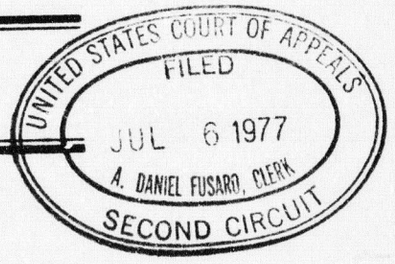
—against—

JEREMIAH T. WALSH, as Commissioner of the City of New York Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,
Defendants,

JEREMIAH T. WALSH,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF APPELLANT'S BRIEF



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REGAL HEALTH SPA, INC.,

Plaintiff-Appellant

- against -

JEREMIAH T. WALSH, AS COMMISSIONER OF THE CITY OF NEW YORK DEPARTMENT OF BUILDINGS, PAUL O'DWYER, AS PRESIDENT OF THE NEW YORK CITY COUNCIL, HONORABLE LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND HONORABLE HUGH CAREY, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants

JEREMIAH T. WALSH,

Defendant-Appellee.

----------X

PRELIMINARY STATEMENT

Appellant appeals from an Order and Judgment entered in the United States District Court for the Southern District of New York on the 12th day of April, 1977 (McMahon, J.) dismissing Appellant's action to declare Zoning Resolution 81-021 promulgated by the New York City Council on January 8th, 1976 Unconstitutional and to enjoin Appellee from

enforcing same and denying appellant's motion for a temporary injunction. The Court below dismissed the Complaint relying upon the doctrine of abstencion by the Federal Judiciary from interferring in State Court proceedings. Notice of Appeal was duly served and filed.

I S S U E

1. Should a Federal Court abstain from entertaining an action for a judgment declaring a City Ordinance to be unconstitutional as violative of due process and equal protection of law and to enjoin a ministerial officer from enforcing same?

2. Should the Doctrine of Abstention be applied to a challengae to the Constitutionality of a Zoning Resolution that does not interfere with the operation of State Courts?

3. Should the institution of a minor and collateral criminal proceeding, subsequent to the commencement of the Federal action, require a Federal Court to abstain?

STATEMENT OF FACTS

Appellant is the owner of a health club located at 135 West 45th Street, New York City, with a valid Certificate of Occupancy. The lease was purchased by appellant on the 15th day of January,1976, and a considerable cash investment was made for the improvement of the premises.

There is no allegation that the premises have been used for any illegal purpose, nor that they are a center for crime of any sort. Therefore, the issue is whether the Zoning Resolution 81-021 promulgated on the8th day of January,1976 by the City Council of the City of New York is confiscatory or discriminatory. The Zoning Resolution 81-021 reads as follows:

> When permitted by the underlying district regulations physical culture or health establishments, however described or advertised, including without limitation reducing salons, massage establishments or steam baths, are restricted to locations in transient hotels with 200 rooms or more provided that no such use and no accessory business sign fronts upon any street or public way and community facilities or buildings predominantly occupied by a community facility. Where

> such physical culture or health establishments contain any of the following regulations size sport facilities: basketball courts, handball courts, squash courts, tennis courts or a swimming pool of a minimium 15200 square feet and location restrictions shall not apply. Where a use is rendered nonconforming by such locational restrictions and where such use does not occupy at least 4500 square feet on one floor as of October 1,1975, such use shall terminate not later than one year after the effective date of such restriction and thereafter the space formerly occupied by such use shall be used for only a conforming use.

It is to be noted that the zoning resolution creates two (2) classes of health clubs. Those occupying at least 4500 square feet or having basketball courts, handball courts, squash courts, tennis courts or swimming pool of a minimium of 1500 square feet are not limited in their right to select business locations. Those without such facilities are restricted to locations in transient hotels with 200 rooms or more. Appellant's business is in premises that do not satisfy the more restricted requirements. Were appellant required to move, its investment and customer goodwill would be destroyed.

On or about the 9th day of March, 1977, Appellee, JEREMIAH T. WALSH, the Commissioner of the New York City Department of Buildings served Appellant with a Notice of Violation of Zoning Resolution 81-021 and demanded that appellant remove from the premises.

It must be noted that a one (1) year moritorium period was allowed by Zoning Resolution 81-021 and notice to discontinue non-conforming uses was served upon appellant shortly after the passage of one (1) year.

On the 18th day of March, 1977, appellant commenced this action by filing the complaint herein for judgment declaring Zoning Resolution 81-021 Unconstitutional and to enjoin appellee, WALSH, from enforcing it. Appellant submitted an Order to Show Cause for a temporary injunction prohibiting Appellee from enforcing the zoning resolution during the pendency of the action, containing a temporary restraining order to prohibit enforcement pending determination of the motion for temporary injunction. John W. Russell, Assistant Corporation Counsel, assigned to the Midtown Task Force, appeared on behalf of appellee, WALSH, and opposed the grant for a Temporary Restraining Order. Judge Lloyd F. McMahon refused to sign the Temporary Restraining Order.

Immediately, three (3) days later, on March 21,1977, Appellee, WALSH, caused a Summons returnable in the Criminal Court of the City of New York, to be served upon Sari M. Rucker, an employee of Appellant for failure to comply with the zoning resolution.

Based upon the minor criminal proceding commenced, subsequent to the commencement of the Federal Action, appellant crossed moved to dismiss the action on grounds that there was criminal action pending between the parties in State Court and therefore, the Federal Court should abstain from assuming jurisdiction.

In this posture, appellant's motion for a temporary injunction and appellee's cross motion to dismiss the complaint came on before Justice Lloyd F. Mc Mahon who denied appellant's motion and granted the motion to dismiss of appellee, WALSH, by consent of the parties, the action was discontinued as to Defendants, CAREY, LEFKOWITZ and O'DWYER, writing as follows:

"Upon consideration of the record before it, this Court finds that there presently is pending in the Courts of the State of New York a criminal action wherein the Plaintiff has the opportunity to litigate its constitutional claims, that the Plaintiff has by virtue of that pending state criminal action an adequate remedy at law and that the plaintiff has failed to allege or show any special circumstances to warrant federal interference therein by means of injunctive or declaratory relief. The zoning ordinance challenged in this action is one which is of great importance to the City of New York and this Court shall decline to exercise jurisdiction under the principles of comity and federalism recognized in Younger v. Harris, 401 U.S. 37 (1971), Samuels v. Mackell, 401 U.S. 66 (1971), Hicks v. Miranda, 422 U.S. 332 (1975) and Juidice v. Vail, 45 U.S.L.W. 4269."

POINT ONE

THE DOCTRINE OF ABSTENTION SHOULD NOT BE APPLIED TO A CIVIL RIGHTS ACTION TO ENJOIN A STATE ADMINISTRATIVE AGENCY FROM VIOLATING THE CIVIL RIGHTS OF THE COMPLAINANT UNDER COLOR OF A CITY ZONING ORDINANCE.

This is an action herein to declare New York City Zoning Resolution Unconstitutional and to enjoin an administrative officer of the State, the Commissioner of Building and Housing of the City of New York, from enforcing it. It is the contention of appellant that Zoning Resolution 81-021 is Unconstitutional, as violative of the due process and equal protection safeguards of the Fourteenth Amendment and that appellant Commissioner of the Building and Housing of the City of New York should be enjoined from enforcing it, under color of State Law. It is the further contention of appellant that the statute creates an irrational distinction between larger and more sophisticatedly equipped health clubs and their more modest counterparts, by drastically limiting the places of location of the latter, without imposing such restrictions in the case of the former. It is difficult to conceive of a case that more traditionally falls within the ambit of FederalCourt jurisdiction over civil rights litigation.

42 U.S.C. 1983 affords the Federal Courts original jurisdiction in actions for relief against State officers denying Constitutional perogative under color of State Law. Federal Courts have original jurisdiction over such actions, even though the litigant might well have elected to litigate his Constitutional cliam in the first instance in a State tribunal. Monroe v. Pape, 365 U.S. 167 (1961). It has been traditionally held that a litigant need not first exhaust his State remedies before seeking Federal Civil Rights relief, unless he is a State prisoner and the relief he seeks is discharge from custody. Breiser v. Rodriguez, 411 U.S. 475 (1973). By Statute, a prisoner seeking his release, is required to first exhaust his State remedies. 28 U.S. 2254. In the case of a party, other than a prisoner challenging the legality of his detention, should he present his Constitutional claim to a State tribunal for adjudication, it will be deemed that he has made an election of remedies, and he will be barred from relitigating the Constitutinnal issue in Federal Court. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); Cf. Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2nd Circ., 1974), Taylor v. New York City Transit Authority, 433 F.2d

665 (2nd Circ., 1970). Thus, the doctrine of exhaustion of State remedies is inapplicable to civil rights litigation, absent an issue of illegal detenction.

To hold that a person is barred from involking Federal Civil Rights jurisdiction because the issue might properly be presented to a State tribunal is to completely emasculate the Civil Rights Act, since all States will entertain Civil Rights claims and therefore, the Congressional mandate to Federal Courts would no longer be exercisable in any case where such objection be interposed.

Given that Federal Courts have concurrent jurisdiction to entertain lawsuits that challenge State action under color of law as Constitutionally offensive with their State counter parts, it is the exception, rather than the rule, that Federal Courts will exercise original discretion to decline original jurisdiction in such matters, and the fundamental basis for such discretionary declination is traditional comity practice.

Thus, where a challenge is made to the Constitutionality of State Law, a Federal tribunal may properly abstain from entertaining the action to abide a remand of the Plaintiff to State Courts to interpret the challenged statute under State law to determine whether plaintiff falls within its

prohibitive ambit. Should the State court hold that a regulatory provision is not applicable to the plaintiff, there would be no need to reach the Federal question by reason of mootness. However, abstention to obtain a State interpretation is only applicable where there is uncertainty as to the scope of the challenged provision. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), supra; Coleman v. Ginsberg, 428 F.2d 767 (2nd Circ., 1970); Lake Carriers Assn. v. MacMullan, 406 U.S. 498 (1972). Where there is no amiguity on the face of the challenged State provision, there is no need for an interpretation whether plaintiff falls within its prohibitory ambit, and there is no need for a Federal tribunal to abstain, pending State Court determination whether the Constitutional question will have to be reached. An ambiguous provision, as in the case at bar, requires the Federal Court to adjudicate the Constitutional issue, barring other possible issues of comity. Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Circ., 1968). The challenged provision in the case at bar is ambiguous. It creates two classes of zoning restrictions. Large health clubs occupying at least 4,500 square feet or equipped with

swimming pools or other specified facilities are free of zoning restrictions. Smaller health clubs are almost zoned out of existence and are required to abandon their goodwill and capital investment and pack their bags to try to find new quarters that are limited to residence hotels with two hundred (200) rooms or more. It is submitted that the Court below should have adjudicated the Constitutionality of the zoning resolution, since no comity consideration required abstention.

"Where resolution of the Federal Constitutional question is dependent upon, or may be materially altered by the determination of an uncertain issue of State law, abstention may be proper in order to avoid unnecessary friction in Federal-State relations, interference with important State functions, tentative decisions on questions of State law and premature Constitutional adjudiciation.... The doctrine, however, contemplate that deference to State court adjudication only be made where the issue of State law is uncertain...If the State statute in question, although never interpreted by a State tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the Federal Constitutional question, it is

the duty of the Federal Court to exercise its properly invoked jurisdiction." Harman v. Foressenius, 380 U.S. 528, (1965). Zoning Resolution 81-021 is ripe for Federal adjudication. Baggett v. Bullett, 377 U.S. 360 (1964); Turner v. City of Memphis, 369, U.S. 350; McNeese v. Board of Education 373 U.S. 668 (1959); NAACP v. Bennett, 360 U.S. 471 (1959); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

"In thus expanding Federal judicial power, Congress imposed the duty upon all levels of the Federal judiciary to give due respect to a suitor's choice of a Federal forum for the hearing and decision of his Federal constitutional claims. Plainly, escapte from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the Federal Courts....to guard, enforce and protect every right granted or secured by the Constitution... Though never interpreted by a State Court, if a State statute is not fairly subject to an interpretation which will avoid or modify the Federal Constitutional question, it is the duty of a Federal Court to decide the Federal question when presented to it. Any other course would impose expense and long dely upon the litigants without hope of its bearing

fruit. . . .Abstention cannot be ordered simply to give State Courts the first opportunity to vindicate the Federal claim. . . For the recognitition of the role of State Courts as the final expositors of State law implies no disregard for the primacy of the Federal judiciary in deciding questions of Federal law." Zwickler v. Koota, 389 U.S.241 (1967).

The doctrine of comity will be applied by Federal Courts to abstain from interfering with State Court prosecution of crimes. Federal Courts will not enjoin the prosecution of a State indictment. Younger v. Harris, 401 U.S. 37 (1970); Samules v. Mackell, 401 U.S. 66 (1970); Hicks v. Miranda, 422 U.S. 332 (1975). A State prisoner under indictment must face trial and if convicted, exhaust his State remedies before seeking Federal relief. Fay v. Noia, 372 U.S. 391 (1963). The doctrine of abstention is not limited to the State Court administration of criminal law, Federal Courts will not sit beside their State Court brethren to interpret the propriety of ex parte attachment statutes and the safeguards required by the Constitution for such provisional remedy. Carey v. Sugar, 425 U.S. 73 (1976). The remedy of an aggrieved party is to pursue his State appellate remedies and if still dissatisfied, apply for certiorari to the Supreme Court. By the

same reasoning, Federal Courts should abstain from ruling upon the propriety of the use by State Courts of contempt proceedings in supplementary proceedings against judgment debtors. Juidice v. Vail, ___U.S.____45 U.S.L.W. 4269 (1977).

However, State administrative and executive officers are not entitled to the application of the same principles of comity, as are the State judiciary. In Wooley v. Maynard, ____U.S._____,45 U.S.L.W. 4379 (1977), a member of the Jehovah's Witnesses challenged the legality of the State statute requiring every automobile license plate to display the motto imprinted on it, "Live Free or Die". The complainant had been convicted several times for covering the motto on his license pla and paid a fine on each occasion. He had not pursued his State appellate remedies. The Supreme Court nevertheless held the issue of State statute Constitutionality to be ripe for Federal review. The Plaintiff had not been seeking to wipe out an old conviction, but to seek Federal relief from the threat of multiple porsecutions for the exercise of a First Amendment right. In the case at bar, the Midtown Enforcement Project, after the commencement of this action, sought to bring into play the doctrine of Federal abstention by commencing a

criminal action by serving one of appellant's employees with a Criminal Court Summons for violation of the Zoning Resolution. The action has proved to be without merit, by the determination in a civil action brought by appellee against appellant in New York County Supreme Court, Walsh v. Regal Health Spa, Inc., Index Number 40977/1977, subsequent to the dismissal of this action. By decision dated the 21st day of June,1977, Justice Thomas Hughes granted appellant's motion to dismiss the complaint of appellee as failing to set forth a cause of action, by reason of the failure of appellee to make application to the State Board of Standards and Appeals to vacate the Certificate of Occupancy of appellant. Since appellant possesses a valid Certificate of Occupancy, no criminal action will lie against it for a zoning violation, without a determination by the New York State Board of Standards and Appeals whether appellant is entitled to rely upon the validity of its Certificate of Occupancy and to a non-conforming use of the premises. Moreover, the criminal action commenced by appellee against appellant would not resolve the Constitutional question, but, as in Wooley v. Maynard, would merely result in a fine, should appellant be convicted. Appellant does not seek to enjoin that incid-

ental criminal action, but rather applies for a declaration of the Unconstitutionality of the Zoning Resolution to eliminate the threat of future and repeated harassing prosecutions.

Appellant's posture must be clearly distinguished from that of the topless bar that was not granted relief in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). In that case an ordinance was promulgated probibiting topless dancing. Three bars that had furnished such entertainment commenced a Federal Civil Rights action to declare the ordinance Unconstitutional. All three bars had discontinued topless dancing following promulgated of the ordinance. However, when a tempoary restraining order was denied, one of the bars resumed the practice and a criminal prosecution was commenced against it. The Supreme Court had held that the Court should not have abstained from entertaining the Constitutional question for the two bars against which there was no criminal action, but abstention was proper in the case of the bar against which a criminal prosecution was pending. In the case at bar not afforded federal relief, it had elected to violate the criminal law in a positive manner following commencement of the Federal action and thereby impliedly

chose the State Criminal Court to litigate the issue, waiving Federal jurisdiction. In the case at bar, appellant did not commit any positive act in defiance of local criminal law, subsequent to commencement of the Federal action, but it was appellee that brought into play the State criminal law in bad faith for the express purpose of using the prosecution to oust the Federal court of jurisdiction. As had been pointed out, State prosecution for a zoning resolution violation does not resolve the issue, nor does appellant seek to enjoin that proseuction, but rather the threat of multiple harassment in the future, whether by way of criminal proseuction for zoning violation, agency challenge to its Certificate of Occupancy before the New York State Board of Standards and Appeals and State Court injunction proceedings, with the ever present danger of an ex parte restraining order that would destroy appellant's business without opportunity for a hearing.

It has been held that the police department of a State can be enjoined from enforcing a local statute would impinge upon First Amendment rights. Allee v. Medrano, 416 U.S. 802 (1974). Recently, Judge Cannella of the United States District Court for the Southern District of New York enjoined the police and appellant, Walsh, from harassing the owners of certain book stores that sell sexually oriented

materials to the public. Black Jack Distributors, Inc. v. Beame, 77 Civ 2570 (June 2nd, 1970). It is difficult to understand how appellant Walsh, as Commissioner of Building and Housing distinguishes himself from the cases cited, in urging for an immunity that no administrative officer is entitled to. Indeed, it is stressed that it is not any present Court proceeding that appellant seeks to enjoin, but rather the threat of future harassment, as in Blackjack. The fact that Blackjack could defend in State Court the unfounded criminal actions brought against its employees, was no bar to Federal intervention. Nor should such always present opportunity be a bar against appellant. Indeed, appellant is not charged with any crime in the traditional sense of that term, but rather an alleged improper use of its property, that cannot possibly be resolved in the lower State Criminal Courts, within their limited facilities. Under such circumstances, the doctrine of abstention is inapplicable and the Court below was in error in applying it.

POINT TWO

THE COURT BELOW SHOULD BE DIRECTED TO CONDUCT A HEARING TO DETERMINE WHETHER THERE IS ANY RATIONAL DISTINCTION TO JUSTIFY FAVORED ZONING TREATMENT FOR LARGER AND BETTER EQUIPPED HEALTH CLUBS OVER THEIR SMALLER COUNTERPARTS.

The Court below dismissed the complaint as insufficient as a matter of law, and so, never reached the "equal protection" issue, whether there was a rational basis for the classification of health clubs by restricting the location for small ones, while their larger and better equipped counterparts are afforded unlimited location opportunities. By decreeing that the smaller businesses would no longer be entitled to remain in their locations, but would have to seek new and difficult to find quarters, their customer goodwill and investment in improvements is thereby wiped out, raising a substantial due process question. The court reached neither the due process nor the equal protection questions, while opting for abstention.

"In situations involving suspect classifications or constitutional rights, strict judicial scrutiny of the challenged classifications has been employed requiring proof of a compelling state interest in order to withstand attack." Barachi v. Sarafan, U.S.D.C., Southern District of New York, 76 Civ 3070 (December 23rd,1976). Where the state seeks to treat one class differently than another the burden falls on it to plead and prove a compelling state interest to justify the distinction. The State has a duty to "show" an "underlying. . .interest to which its discrimination. . .can be rationally related." Shapiro vs. Thompson, 394 U.S. 618 (1969). Classifications by the State in the administration of its laws will withstand equal protection challenge if the State can support them with a rational basis. Where they are arbitrary, they are discriminatory and cannot stand. Reed v. Reed, 404 U.S. 71 (1971). "The Courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." McLaughlin v. Florida, 379 U.S. 184 (1964). The law may not apply an "unequal hand" without a rational basis. Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942).

The burden is on appellee to justify the classification of health clubs for zoning purposes. It is burden that seems too unwieldly for appellee to meet. The burden will be heavy for appellee, since he must show that appellant is the proximate cause of the ill sought to be remedied. The existence of the ill does not justify a conclusion that it has been caused by appellant. An examination of the affidavits and other papers of appellee reveals that they abound in conclusions, without facts to indicate appellant has caused any injury to the environment.

The case should be remanded to the Court below with instructions to entertain the action herein and to conduct a hearing, with the burden on appellee to justify the Zoning Resolution in a Constitutional sense.

C O N C L U S I O N

THE JUDGMENT OF THE COURT BELOW DISMISSING THE COMPLAINT HEREIN AND DENYING APPELLANT'S MOTION FOR A TEMPORARY INJUNCTION SHOULD BE REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS.

RESPECTFULLY SUBMITTED,

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Service of ~~three (3)~~ Two (2) copies of the within is hereby admitted

this 6th day of July 1977

W. Bernard Richland

Attorney(s) for Plaintiff-Appellant

by: David H Rosen